A

IJM CORPORATION BHD

v.

HARTA KUMPULAN SDN BHD

B

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY J
[CIVIL SUIT NO: (MT1) 22-724-2005]
18 JANUARY 2007

C ***COMPANIES LAW:*** *Winding up - Injunction to restrain petition - Allegation that plaintiff was indebted to defendant in the sum of RM28.4 million - Whether alleged debt in dispute - Whether defendant could be categorized as creditor under s. 218 Companies Act 1965 while action for recovery of debt still pending - Whether defendant's threat to commence*
D *winding up proceedings an abuse of court's process - Whether judgment entered for the plaintiff*

TORT: *Nuisance - Unlawful interference - Injunction to restrain defendant from communicating with plaintiff in a manner that constitutes*
E *nuisance - Deliberate harassing and pestering letters - Whether a conduct that was considered nuisance - Whether interfered with a reasonable man's ordinary use of land - Whether defendant's prolix letters demanding for the sum of RM2.84 million and containing constant threats against the plaintiff caused inconvenience and annoyance - Whether sufficient damage*
F *caused - Whether judgment entered for the plaintiff*

The plaintiff and the defendant entered into an agreement to jointly develop two parcels of land ('the lands'). The defendant's contribution to that venture was the said lands and the plaintiff's was the cost of constructing a condominium on the land. The
G terms of the joint development agreement provided, *inter alia*, that both the plaintiff and the defendant would respectively be entitled to a specified number of parcels within the completed condominium. Of the twenty seven parcels belonging to the plaintiff, twenty-two were sold. The plaintiff requested the
H defendant to execute valid and registrable transfers in favour of the plaintiff for the remaining five parcels which the defendant refused. The plaintiff then commenced a civil action in the High Court for an order of specific performance against the defendant ('the first action'). An application for summary judgment followed which was
I granted. The defendant appealed against the judgment. Incidentally, the defendant's appeal to the court of appeal against the judgment had been dismissed. Pending the appeal to the court

of appeal, the defendant complied with the judgment and delivered all documents necessary for registering the transfer of the five unsold parcels to the plaintiff. The defendant then proceeded to invoice the plaintiff for RM2.84 million, purportedly being charges for the sale of the five parcels to the plaintiff. The defendant alleged that the plaintiff was indebted to it in the sum of RM28.4 million. The defendant also sent a statutory demand under s. 218(2)(a) of the Companies Act 1965, followed by letters threatening to file a winding up petition.

The plaintiff thus filed this action, *inter alia*, for a declaration that the defendant was not entitled to commence a winding up action against the plaintiff based on the invoice the defendant had issued and for an injunction restraining the defendant from doing so. In the writ, the plaintiff also sought an injunction to restrain the defendant from communicating with the plaintiff in a manner that would constitute a nuisance upon the plaintiff and for damages ('the second action'). The writ was filed together with a summons for an *ex parte* injunction. The *ex parte* injunction was granted and was subsequently ordered to continue until disposal of this action. The defendant then filed a civil action in the Kuala Lumpur High Court against the plaintiff ('the third action) claiming for RM2.84 million being the cost of the five parcels of condominium the defendant transferred to the plaintiff pursuant to the judgment in the first action. Following the commencement of the third action, the plaintiff filed for summary judgment in this case, that was the second action. The plaintiff claimed that the defendant had no defence to the plaintiff's claims in this action and that judgment should accordingly be entered for the plaintiff without trial. The plaintiff's claim against the defendant in this action were categorized into two limbs (i) for a permanent injunction to restrain the defendant from filing a winding up petition based on the defendant's statutory demand and (ii) that the defendant had committed nuisance and ought to be restrained by injunction from perpetuating the nuisance.

Held (judgment for the plaintiff):

(1) The alleged debt of RM28.4 million was seriously disputed and needed to be established and proven in a civil action. This conclusion was reinforced by the fact that the defendant had filed the third action to recover the alleged debt of RM28.4 million. With the third action still pending, the defendant could not be categorized as a creditor under s. 218 of the

A Companies Act 1965. As such, the defendant's threat to commence winding up proceedings against the plaintiff was an abuse of the court's process. The plaintiff therefore succeeded on the first part of its claim. (para 20)

B **(2)** If the alleged claim for RM28.4 million was a cause to communicate with the plaintiff, the defendant would have been justified if it had sent a demand and stopped there. But to consistently send letters that substantially repeated or dealt with the same issue was the kind of conduct that was C considered nuisance. Deliberate harassing and pestering letters would certainly interfere with any reasonable man's ordinary use of land. It should be more so for the plaintiff, a known public listed company actively running a business. The defendant's prolix letters demanding for the sum of RM2.84 D million and containing constant threats against the plaintiff caused inconvenience and annoyance, and that this was sufficient damage. The plaintiff, consequently, succeeded in the second part of its claim. (paras 26 & 28)

E **(3)** The defendant had failed to raise any issue requiring trial, thus judgment was ordered to be entered for the plaintiff and for the registrar to assess the damages. The defendant was ordered to pay the damages so assessed to the plaintiff on account of the threat to wind up the plaintiff and the nuisance F caused. The defendant was also ordered to pay the plaintiff the taxed costs of this action. (para 29)

Case(s) referred to:

Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 CLJ 2; [1986] CLJ (Rep) 45 SC ***(refd)***

G *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC* ***(refd)***

Hunter and Others v. Canary Wharf Ltd [1997] AC 655 ***(refd)***

Instrumech Engineering Sdn Bhd v. Sensorlink Sdn Bhd [2001] 1 CLJ 132 HC ***(refd)***

Khorasandjian v. Bush [1993] QB 727 ***(refd)***

H *Mann & Anor v. Goldstein & Anor [1968] 2 All ER 769* ***(refd)***

Motherwell v. Motherwell [1976] 73 DLR (3rd) 62 ***(refd)***

Hunter and Others v. Canary Wharf Ltd [1997] AC 655 ***(refd)***

Re Lympne Investments Ltd [1972] 2 All ER 385 ***(refd)***

The Boundaries of Nuisance [1949] 69 LQR 480 ***(refd)***

I

Legislation referred to:
Companies Act 1965, s. 218(1)(e), (2)(a)

For the plaintiff - Clarence Edwin; M/s Zaid Ibrahim & Co
For the defendant - Jayaperakash Jayadevan; M/s Tam Cheng Yau & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Syed Ahmad Helmy J:

[1] In the adjudication of the plaintiff's application in encl. 38 for summary judgment in the action herein it is only appropriate to relate the historical background of the parties relationship.

[2] A business relationship between the plaintiff and defendant was first forged in early 1992. At the material time, the defendant was the registered proprietor of two parcels of land situated in the city of Johor Bahru. The plaintiff and defendant entered into an agreement to jointly develop the lands in question. The agreement, in essence, was a joint venture between the parties. The defendant's contribution to that venture was the two parcels of land and the plaintiff's was the cost of constructing a condominium on the land, which later came to be known as Sri Mulia Condominium.

[3] The terms of the joint development agreement provide, *inter alia*, that both the plaintiff and defendant would respectively be entitled to a specified number of parcels within the completed condominium. The plaintiff's entitlement was termed the Contractor's Building Allocation and it represented twenty-seven parcels within the condominium. The plaintiff was entitled to these twenty-seven parcels in consideration of the plaintiff at its own cost and expense constructing the condominium on the two parcels of land. The defendant's entitlement was termed the Landowner's Building Allocation, which represented the number of parcels allocated to the defendant in consideration for the two parcels of land the defendant provided for the venture.

[4] The joint development agreement also provided that the defendant would, at the plaintiff's request, execute all relevant documents pertaining to the sale or lease of the condominium parcels in the Contractor's Building Allocation. The defendant also agreed that once strata title was issued, the defendant would

execute a valid and registrable transfer in favour of the plaintiff or its nominees for any parcel within the Contractor's Building Allocation that remained unsold.

[5] Of the twenty-seven parcels belonging to the plaintiff, twenty-two were sold. In early 2003, the plaintiff's solicitors requested the defendant to execute valid and registrable transfers in favour of the plaintiff for the remaining five parcels. The defendant refused. The plaintiff then commenced a civil action in the High Court for an order of specific performance against the defendant ("the first action"). An application for summary judgment followed and after hearing the parties, I granted judgment for the plaintiff in the first action. The defendant appealed against the judgment. Incidentally, the defendant's appeal to the Court of Appeal against the judgment was dismissed late last year.

[6] Pending the appeal to the Court of Appeal, the defendant complied with the judgment and delivered all documents necessary for registering the transfer of the five unsold parcels to the plaintiff. The defendant then proceeded on 25 October 2005 to invoice the plaintiff for RM2.84 million, purportedly being charges for the sale of the five parcels to the plaintiff. The defendant alleges that the plaintiff is indebted to it in the sum of RM2.84 million on the strength of this invoice. The day the defendant issued the invoice the defendant also sent a letter to the plaintiff setting out at length its various justifications why the plaintiff ought to pay the sum of RM2.84 million. The only part of that letter, which is relevant for present purposes, reads:

> If we do not receive the payment of RM2.84 million for our cash invoice abovementioned within 3 weeks from the date of service of this letter of demand, we shall take winding up action under the provisions of the Companies Act against you on grounds of ... inability to pay your debt ...

[7] Under s. 218(1)(e) of the Companies Act 1965, the court may order the winding-up of a company if the company is unable to pay its debts. A company is deemed to be unable to pay its debts if a creditor to whom the company is indebted in a sum exceeding five hundred ringgit has served on the company's registered office a demand requiring the company to pay the sum so due, and the company has for three weeks after service of the demand neglected to pay the sum demanded or secure or

compound it to the creditor's satisfaction. This statutory presumption, which may be rebutted, is found in s. 218(2)(a) of the same Act.

[8] Now, there is no prescribed form that a statutory demand issued pursuant to s. 218(2)(a) of the Act must take. In all cases the court would have to examine the demand in question to determine if it meets the criteria set out in that section of the Act. In this case, it is evident that the excerpt from the defendant's letter, which I have set out above, satisfies the criteria of a statutory demand. In point of fact, the defendant also considered it to be a statutory demand. Among the many letters the defendant wrote to the plaintiff after issuing the statutory demand dated 25 October 2005 one dated 29 October 2005 demonstrates this and the relevant part of the letter reads:

> Please let us have a cheque of RM2.84 million in our favour forthwith to avoid winding up action under the Companies Act. A notice of demand dated 25/10/2005 has already been sent to you ...

[9] The defendant did not stop with just a statutory demand under s. 218(2)(a) of the Companies Act 1965. After the letter of 29 October 2005, the defendant sent four other letters threatening to file a winding-up petition. The most resolute of these letters was one dated 7 November 2005 wherein the defendant wrote:

> If we do not receive the sum of RM2.84 million from you as demanded petition for winding up action will be filed by our new solicitors under Section 218(1)(e) read in conjunction with Section 218(2)(a) of the Companies Act. ... Please be informed that our petition will be ready before 17/11/2005 and will be presented to the Court immediately after that date.

[10] It is common ground that the presentation of a winding-up petition can have disastrous consequences for a company. For this reason, a company intending to defend a threatened winding-up petition may seek an injunction to restrain the presentation of the petition. In *Instrumech Engineering Sdn. Bhd. v. Sensorlink Sdn. Bhd.* [2001] 1 CLJ 132, it was decided that a company need not wait for the actual petition to be filed and served as by that time the damage may have already been done.

[11] The plaintiff, being a public listed company with shares quoted on the Malaysian stock exchange was not about to wait and see if the defendant made good on its threat. So the plaintiff

filed this action, *inter alia*, for a declaration that the defendant was not entitled to commence a winding-up action against the plaintiff based on the invoice the defendant had issued and for an injunction restraining the defendant from doing so. In the writ, the plaintiff also sought an injunction to restrain the defendant from communicating with the plaintiff in a manner that would constitute a nuisance upon the plaintiff and for damages ("the second action"). The writ was filed together with a summons for an *ex parte* injunction. The *ex parte* injunction was granted and was subsequently ordered to continue until disposal of this action.

[12] Three months later the defendant filed a civil action in the Kuala Lumpur High Court against the plaintiff ("the third action"). The claim in the third action was for RM2.84 million being the cost of the five parcels of condominium the defendant transferred to the plaintiff pursuant to the judgment in the first action. The defendant alleged in the third action that the sum of RM2.84 million was due under the invoice the defendant had issued to the plaintiff.

[13] Following the commencement of the third action, the plaintiff filed for summary judgment in this case, that is the second action. The plaintiff claims that the defendant has no defence to the plaintiff's claims in this action and that judgment should accordingly be entered for the plaintiff without trial. To succeed in an application for summary judgment, the court must be satisfied that there is no issue or question in dispute that requires a trial. There must be no defence to the plaintiff's claim. As Lee Lun Hoe CJ pointed out in *Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] 1 CLJ 2; [1986] CLJ (Rep) 45, "A defendant ought not to be shut out from defending unless it is very clear that he has no case in the action. A complete defence need not be shown. The defence set up need only show that there is a triable issue or question or that for some reason there ought to be a trial."

[14] As I mentioned earlier, the plaintiff's claim against the defendant in this action can broadly be categorised into two limbs. First is the plaintiff's claim for a permanent injunction to restrain the defendant from filing a winding-up petition based on the defendant's statutory demand. Second is the plaintiff's claim that the defendant had committed nuisance and ought to be restrained by injunction from perpetuating the nuisance.

[15] Insofar as the first part of the plaintiff's claim is concerned, the law is clear. In *Mann & Anor. v. Goldstein & Anor.* [1968] 2 All ER 769, it was held:

> It is well established that this court has jurisdiction to restrain the presentation or advertising of a winding-up petition and restrain all further proceedings on it. That jurisdiction is a facet of the court's inherent jurisdiction to prevent abuse of the process of the court. It will be exercised where a winding-up application is presented or prosecuted otherwise than in accordance with the legitimate purpose of such process.

[16] Ungoed-Thomas J in that case went on to explain the legitimate purpose of the winding-up process as follows:

> The legitimate purpose of such a process is to wind-up a company on a ground specified in the Companies Act 1948, which, so far as material to this case, is the ground that it is unable to pay its debts. It is not its legitimate purpose to decide whether a petitioner claiming to be a creditor is a creditor, because s. 224 makes it a pre-requisite that he should be a creditor before he is even entitled to present a petition at all and before any consideration of the company's insolvency can become relevant. So, in my view, when a petitioning creditor's debt is disputed on such substantial grounds this court should restrain the prosecution of the petition as an abuse of the process of the court even though it should appear to the court that the company is insolvent.

[17] It is clear from the passage above that the winding-up process is not one in which the court determines whether a petitioner is indeed a creditor. A person claiming a debt that he knows or ought to know would be disputed on significant grounds should not resort to the winding-up process. If he does, he is merely attempting to bring improper pressure to bear on a company and such conduct leaves much to be desired. The court would never allow its process to be used for such dastardly tactics, and all such petitions or threatened petitions would be restrained as an abuse of the process of the court. The oft-quoted words of Megarry J in *Re Lympne Investments Ltd.* [1972] 2 All ER 385 merits reproduction here:

> The Companies Court must not be used as a debt-collecting agency, nor as a means of bringing improper pressure to bear on a company. The effects on a company of the presentation of a winding-up petition against it are such that it would be wrong to allow the machinery designed for such petitions to be used as a

means of resolving disputes which ought to be settled in ordinary litigation, or to be kept in suspense over the company's head while that litigation is fought out.

[18] Thus, if the plaintiff establishes that the debt the defendant claims is disputed on substantial grounds, the defendant ought to be restrained from presenting a winding-up petition and summary judgment should be entered for the plaintiff on the first part of its claim. Learned counsel for the plaintiff submitted that the alleged debt was indeed disputed on a substantial ground, that ground being that the defendant's claim for the sum of RM2.84 million was *res judicata*. It was argued that the plea of *res judicata* was a complete defence to the defendant's alleged claim for RM2.84 million for reasons that now follow. In the first action, the plaintiff's claim was that the five parcels belong to it under the terms of the joint development agreement, and that it is the equitable owner of the five parcels along with the twenty-two others that were sold to third parties. The defendant's defence to the plaintiff's claim in the first action was that the claim was barred by limitation and that the plaintiff was required to pay tax based on the estimated market value of the five parcels before the defendant could transfer them to the plaintiff. These were the only two defences raised.

[19] Learned counsel for the plaintiff submitted that the defendant's claim for RM2.84 million had already been litigated and adjudicated upon in the first action. It was contended that the order for specific performance granted in the first action was an endorsement of the plaintiff's beneficial ownership of the five parcels. In view of this endorsement, it is the plaintiff's case that no monetary consideration was payable to the defendant for the transfer of the five parcels pursuant to the order made in the first action. Learned counsel for the plaintiff also submitted that even if this argument were flawed, the alleged claim for RM2.84 million would regardless be an issue that belonged to the first action and ought to have been raised in that action. In support, Peh Swee Chin FCJ's leading account of the doctrine of *res judicata* in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn. Bhd.* [1995] 3 CLJ 783 was referred to.

[20] There is much force in the argument put forward by learned counsel for the plaintiff. But I am disinclined to comment on the correctness of his contentions in view of the fact that the defendant has now filed the third action. The plaintiff's

contentions, I am sure, would be ventilated in the third action and it is not crucial to this case for a determination to be made on these points. What can certainly be concluded at this stage is that the alleged debt is seriously disputed and this conclusion is reinforced by the fact that the defendant has filed the third action to recover the alleged debt of RM2.84 million. This is clearly an acknowledgment that the alleged debt of RM2.84 million is disputed and needs to be established and proven in a civil action. With the third action still pending, the defendant cannot at this stage be categorised as a creditor under s. 218 of the Companies Act 1965.

As such, the defendant's threat to commence winding-up proceedings against the plaintiff was an abuse of the court's process. The plaintiff therefore succeeds on the first part of its claim.

[21] The second part of the plaintiff's claim is for an injunction to restrain the defendant from communicating with the plaintiff in a manner that would constitute a nuisance upon the plaintiff. The plaintiff's complaint stems from the fact that the defendant had been incessantly sending letters to the plaintiff ever since judgment was entered in the first action and with heightened regularity since issuing the invoice for RM2.84 million. The frequency of these letters increased to a point where the defendant was sending letters to the plaintiff almost every other day in early November 2005.

[22] Nuisance is the tort of unlawful interference with a person's enjoyment or use of land. In *Hunter and Others v. Canary Wharf Ltd.* [1997] AC 655, the House of Lords cited with approval Professor Newark's definition of nuisance in his article "*The Boundaries of Nuisance*" [1949] 69 LQR 480. In that article, Professor Newark wrote that the essence of nuisance was that 'it was a tort to land. Or to be more accurate it was a tort directed against the plaintiff's enjoyment of rights over land.' The question in this case is whether the numerous letters the defendant sent to the plaintiff was an unlawful interference with the plaintiff's use of its land and thereby constituted nuisance.

[23] To support the plaintiff's contention that the defendant's act amounted to nuisance, learned counsel for the plaintiff referred to *Motherwell v. Motherwell* [1976] 73 DLR (3rd) 62 and *Khorasandjian v. Bush* [1993] QB 727. *Motherwell v. Motherwell* [1976] 73 DLR (3rd) 62 is a decision of the Appellate Division of the Alberta Supreme Court where it was held that a legal owner of property can obtain an injunction to restrain persistent harassment by unwanted telephone calls to his home on the ground that the calls constituted a private nuisance. In that case, the Alberta Supreme Court rejected the proposition that:

> The common law does not have within itself the resources to recognise invasion of privacy as either included in an existing category or as a new category of nuisance and that it has lost its original power, by which indeed it created itself, to note new ills arising in a growing and changing society and pragmatically to establish a principle to meet the need for control and remedy; and then categories to develop the principles as the interests of justice make themselves sufficiently apparent.

[24] In *Khorasandjian v. Bush* [1993] QB 727, the English Court of Appeal endorsed *Motherwell v. Motherwell (supra)* as an accurate statement of the common law. In *Khorasandjian v. Bush (supra)*, the defendant pestered the plaintiff with telephone calls to her parents' home. Since the calls were made to the parents' home and not the plaintiff's home, it was argued that the plaintiff could not invoke the tort of private nuisance to obtain an injunction against the defendant. It was argued that in order to invoke the tort of private nuisance, the complainant must own the land and a mere licensee was not entitled to seek any relief in law. Rejecting the argument, Dillon LJ said:

> It is ridiculous if in this present age the law is that the making of deliberately harassing and pestering telephone calls to a person is only actionable in the civil courts if the recipient of the calls happens to have the freehold or a leasehold proprietary interest in the premises in which he or she has received the calls.

[25] Learned counsel for the plaintiff submits that if deliberate harassing and pestering telephone calls constitute an actionable nuisance, deliberate harassing and pestering letters should likewise constitute an actionable nuisance. There is no local authority on this point, which is novel. For my part, I agree that if a person sends deliberate harassing and pestering letters to another, such an act amounts to an interference with the recipient's enjoyment of land and therefore constitutes an actionable nuisance. There is

no dispute in this case that the defendant sent these letters to the plaintiff's premises constantly and never desisted until restrained by the interlocutory injunction granted earlier in this action.

[26] The defendant offered precious little in its affidavit to explain its conduct. The defendant merely denied committing nuisance, and relied on its alleged claim for RM2.84 million as justification for the string of letters it sent to the plaintiff. If the alleged claim for RM2.84 million was a cause to communicate with the plaintiff, the defendant would have been justified if it had sent a demand and stopped there. But to send consistently letters that substantially repeats or deals with the same issue over and over is something else and that kind of conduct is nuisance. Even learned counsel for the defendant did not attempt to explain his client's conduct and did not touch on this part of the plaintiff's claim at all in his submission save to say that there are triable issues. What those issues were remain obscure. Having considered all matters, I am of the view that there are no issues that require a trial insofar as this part of the plaintiff's claim is concerned.

[27] One final matter remains. A necessary ingredient in the tort of private nuisance is damage. To succeed in its claim, the plaintiff must prove that the defendant's act caused it injury or damage. Learned plaintiff's counsel argued the fact that incessant letters were sent to the plaintiff thereby causing annoyance is itself sufficient proof of damage. Reference was made to *Khorasandjian v. Bush (supra)* where Dillon LJ was reported to have said:

> Damage is, in the relevant category, a necessary ingredient in the tort of private nuisance ... So far as the harassing telephone calls are concerned, however, the inconvenience and annoyance to the occupier caused by such calls, and the interference thereby with the ordinary and reasonable use of the property are sufficient damage.

[28] In my view, deliberate harassing and pestering letters would certainly interfere with any reasonable man's ordinary use of land. It should be more so for the plaintiff, which is a known public listed company actively running a business. I am satisfied that the defendant's prolix letters demanding for the sum of RM2.84 million and containing constant threats against the plaintiff caused inconvenience and annoyance, and that this is sufficient damage. The plaintiff, consequently, succeeds in the second part of its claim.

[29] As the defendant failed to raise any issue requiring trial, I ordered judgment to be entered for the plaintiff and for the registrar to assess the damages. The defendant shall pay the damages so assessed to the plaintiff on account of the threat to wind-up the plaintiff and the nuisance caused. The defendant shall also pay to the plaintiff the taxed costs of this action.